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No. 07-335

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IN THE

Supreme Court of the United States

Shelly Parker, Tom G. Palmer,
Gillian St. Lawrence, Trace Ambeau,
and George Lyon,
Cross-Petitioners,

v.

District of Columbia and
Mayor Adrian M. Fenty
Cross-Respondents.

On Petition For A Writ of Certiorari
To the United States Court of Appeals
For The District of Columbia Circuit

AMICUS CURIAE BRIEF OF AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded by former Reagan Senior White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This is exactly the kind of case that is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, including those under the Second Amendment, and that Second Amendment rights are protected as strongly and equally with the others in the Bill of Rights.

Counsel of Record for all parties were timely notified of this brief under Rule 37 and have consented to its filing.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. The letters of consent to the filing of this brief have been enclosed.

STATEMENT OF THE CASE

The original plaintiffs filed this action on February 10, 2003 in the United States District Court for the District of Columbia against the District of Columbia and then Mayor Anthony Williams arguing that the District's laws banning handguns and the possession of functional firearms within the home for self-defense and other uses violated their rights under the Second Amendment to the U.S. Constitution.

Plaintiff Shelly Parker resides in a high crime area of the District. (App. 10). She has been active in organizing her community against drug dealers, who have threatened her and her neighbors as a result. (App. 10). These local criminals broke the front window of her house and the back window of her car, stole a security camera from outside her home, and smashed a car into her back fence. (App. 10).

In the dark of night on February 12, 2003, a drug dealer known as "Nanook" started banging on her front door and tried to pry into her house, while repeatedly yelling "bitch, I'll kill you, I live on this block, too." (App. 10--11).

Parker wants to keep a handgun in her home for self-defense, but under the District's laws she would face criminal prosecution and penalties if she possesses a handgun or any other functional firearm in her home, including rifles and shotguns. D.C. Code Section 7-2507.02 states, "each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreation purposes within the District of Columbia." This provision applies to rifles and shotguns as well as handguns, and by its very terms prohibits the assembling and loading of a firearm for self-defense even within the home. (App. 39) D.C. law even prohibits

carrying a functional firearm from one room within the home to another for self-defense.

Plaintiff Dick Heller also resides in a high crime neighborhood of the District. (App. 12). Two open air drug markets operate near his home. (App. 12). He is a Special Police Officer employed by the District to provide security for the federal judiciary at the Thurgood Marshall Federal Judicial Center. (App. 12). In that capacity, Heller is armed with a handgun during the day. (App. 12). He desires to possess a functional handgun and rifle in his home for self-defense, but that is prohibited under the District's criminal law. Violating those laws would subject him to criminal penalties and dismissal from his work.

Heller applied to the District for permission to keep a handgun within his home for self-defense, but was refused. (App. 12).

Plaintiff Tom G. Palmer is a gay man who resides in the District. (App. 13-14). In 1982, he was assaulted by gay bashers, but he successfully warded off the attack with a handgun. (App. 14). He desires to possess a functional handgun and a functional rifle in his home for self-defense. (App. 13-14). But under the District's laws he would face criminal prosecution and penalties if he does so.

Plaintiff Gillian St. Lawrence resides in the District of Columbia. (App. 14). She lawfully owns a registered shotgun which she desires to keep assembled and unlocked within her home to use for self-defense. (App. 15). But under the District's laws she would face criminal prosecution and penalties if she does so.

Plaintiff Tracey Ambeau resides in the District of Columbia, and desires to possess a functional handgun within her home for self defense. (App. 16). But under the

District's laws she would face criminal prosecution and penalties if she does so.

Plaintiff George Lyons resides in the District of Columbia, and desires to possess a functional handgun and a functional rifle within his home for self defense. (App. 16). But under the District's laws he would face criminal prosecution and penalties if he does so.

The District has openly stated in many forums that it will prosecute these Plaintiffs if they violate any of the District's criminal prohibitions on handguns and functional rifles and shotguns.

The District Court nevertheless ruled that the Second Amendment does not provide any effective right to Americans to keep and bear arms. On appeal, the District of Columbia Circuit Court held that all of the above Plaintiffs except Heller did not have standing to bring this action. The court held that Heller did have standing because he had applied for a permit for a handgun, which the District denied.

The Circuit Court then went on to evaluate Heller's claims. The Court ruled that the Second Amendment does protect an individual right of each U.S. citizen to keep and bear arms, and that the District's prohibition on handguns within the home for self-defense violated that Amendment.

The District has filed a petition for a writ of certiorari to review that ruling. The original plaintiffs besides Heller have filed a cross-petition asking this Court to grant a writ of certiorari on the issue of standing and to restore their standing in this case. The American Civil Rights Union now files this *Amicus Curiae* brief supporting the cross-petitioners.

SUMMARY OF ARGUMENT

The Statement of the Case above shows that all of the original plaintiffs have proven sufficient facts to establish standing in this case. No further factual foundation is needed for the courts to evaluate their Second Amendment claims and rule on them. It would not help the Second Amendment analysis in any way for these plaintiffs to violate the law and be criminally prosecuted. That would not help the courts to decide if the Second Amendment provides an individual right to keep and bear arms. Whether the Second Amendment does provide such an individual right does not turn on any additional facts that would arise from such a criminal violation and prosecution.

Indeed, the fact that Heller applied to register a handgun and was denied did not play any significant role in deciding whether the District's handgun prohibitions violated the Second Amendment. The law already states that all such handgun applications will be denied for any handguns not already registered as of September, 1976, except for applications from retired District police officers. .

Nor can it be said that if the plaintiffs in this case went ahead and violated the law by maintaining functional handguns in their homes for self-defense that their prosecutions would be "conjectural" or "hypothetical" or "speculative". The District is well known for vigorously enforcing its gun laws. It openly states as much over and over in public and in this case, and has specifically threatened to prosecute these particular plaintiffs if they should violate the law.

On these facts, the ruling of the Court below on standing is in conflict with the governing precedents of this Court, and with the decisions of the other circuits.

Moreover, this case presents vitally important questions of law concerning whether citizens will have meaningful and equal access to the courts to protect their Second Amendment rights The courts cannot treat the Second Amendment as a politically incorrect, disfavored stepchild of the Bill of Rights. Fidelity to the Constitution requires the courts to give it the same zealous protection as every other right stated in our founding document. But the ruling on standing in this case does not reflect equal access to the courts for Second Amendment rights as for other rights.

ARGUMENT

I. THE DECISION OF THE COURT BELOW ON STANDING CONFLICTS WITH THE ESTABLISHED PRECEDENTS OF THIS COURT AND THE DECISIONS OF THE OTHER CIRCUIT COURTS.

The proven facts in this case show that all the plaintiffs have standing for their Second Amendment claims. The plaintiffs are all law abiding residents of the District who desire to keep handguns or other functional firearms in their homes for self-defense. They each have good reason to fear that crimes and violence may be committed against them.

But the laws of the District prohibit the plaintiffs from possessing and using handguns or other functional firearms for self-defense within the home. All firearms are banned absent registration with the District, and the law prohibits the District from accepting any handgun registrations after September, 1976, except for applications from retired District police officers. The law even prohibits plaintiffs from carrying a handgun from one room to another within their homes for self-defense. Moreover, even lawfully registered firearms must be kept unloaded and disassembled or disabled with trigger locks. The law by its very terms does not allow residents to assemble or unlock and load such

firearms even for self-defense within the home. These gun laws are the strictest and most onerous in the nation, and if the Second Amendment prohibits any gun restrictions, it would prohibit these.

If any of the plaintiffs violate these laws, their criminal prosecution is not "conjectural" or "hypothetical" or "speculative". Quite to the contrary, there is no doubt the District would prosecute them if their violations are discovered. Indeed, on numerous occasions the District has publicly threatened to prosecute these precise plaintiffs if they violate the District's gun laws.

Therefore, absent standing to challenge the District's gun laws, these plaintiffs face an oppressive legal dilemma. They must either forego their constitutional rights under the Second Amendment or risk criminal prosecution and punishment. The laws and traditions of our nation do not permit such cavalier disregard of constitutional rights.

Given these established facts, all of the original plaintiffs in this action do have standing under the established precedents of this Court and the decisions in other circuits across the country. No further factual foundation is needed for the courts to evaluate their Second Amendment claims and rule on them. It would not help the Second Amendment analysis in any way for these plaintiffs to violate the law and be criminally prosecuted. That would not help the courts to decide if the Second Amendment provides an individual right to keep and bear arms. Whether the Second Amendment does provide such an individual right does not turn on any additional facts that would arise from such a criminal violation and prosecution.

Indeed, the fact that Heller applied to register a handgun and was denied did not play any significant role in

deciding whether the District's handgun prohibitions violated the Second Amendment.

In the recent case of *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007), this Court said, in the words of Justice Scalia,

> "[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but does not eliminate Article III jurisdiction. For example, in *Terrace v. Thompson*, 263 U.S. 197...(1923), the State threatened the plaintiff with forfeiture of his farm, fines and penalties if he entered into a lease with an alien in violation of the State's anti-alien land law. Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action."

127 S. Ct. at 772.

After citing some more cases, this Court went on to say,

> "In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do....That did not preclude subject-matter jurisdiction because the threat eliminating behavior was effectively coerced....The dilemma posed by that coercion—putting the challenger to the choice between abandoning his

> rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.' *Abbott Laboratories v. Gardner*, 387 U.S. 136... (1967).

This *Medimmune* analysis applies directly to the present case. Denying standing to all but one of the original plaintiffs puts them exactly in the position of being required to expose themselves to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced. They are faced exactly with the dilemma of abandoning their constitutional rights or risking prosecution. This Court said in *Medimmune* that standing should be recognized precisely to avoid this situation.

Similarly, in *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979), this Court said,

> "When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights'....When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'"

442 U.S. at 298. *Accord: Steffel v. Thompson*, 415 U.S. 452 (1974);*Lake Carriers' Ass'n v. Macmullen*, 406 U.S. 498 (1972); *Abbott Laboratories*, 387 U.S. at 152-153.

Again, plaintiffs in the present case are precisely seeking to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute. But

under the ruling of the Court below on standing, the excluded plaintiffs are precisely forced to expose themselves to arrest or prosecution to challenge the statute deterring the exercise of constitutional rights.

Even the Court below noted that its ruling on the standing issue seemed to be in conflict with this Court's decision in *United Farm Workers.* (Pet. App. 6a). The Court also found a conflict with *Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988), discussed further below.

But the Court nevertheless felt compelled to follow *Navegar v. United States,* 103 F.3d 994 (D.C.Cir. 1997), as the governing precedent in the D.C. Circuit. That case considered challenges by gun manufacturers to the Federal assault weapons ban. The court found standing by those manufacturers whose products were specifically named in the Federal legislation. But other manufacturers whose products only seemed to match various features and characteristics prohibited in the legislation were denied standing, leaving them to choose either to cease manufacturing various products or risk prosecution.

Similarly, in *Seegers v. Gonzales,* 396 F. 3d 1248 (D.C. Cir. 2005), the court felt compelled to follow *Navegar* in denying standing to District of Columbia residents who wanted to challenge the District's gun laws on Second Amendment grounds as well. But even the *Seegers* court noted that the *Navegar* rule seemed to be in conflict not only with *United Farm Workers*, but also with Supreme Court and D.C. circuit precedents involving pre-enforcement challenges to agency regulations. 396 F.3d at 1252 -1254. In those cases, *Seegers* correctly noted that,

> "[A]n affected party may generally secure review before enforcement so long as the issues are fit for judicial review without further factual development

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> "The allegedly constitutionally protected conduct in the record before us is clearly defined and clearly unlawful under a statute that the District apparently enforces regularly, and under which there is certainly no doubt that plaintiffs reasonably apprehend enforcement.

396 F.3d at 1258. Judge Sentelle so rightly concluded that this Court's precedents in *United Farm Workers* and *American Booksellers* should have been the controlling authorities in *Seegers*, not the D.C. Circuit's confused *Navegar* decision. The same is true for the present case.

Finally, the decision of the D.C. Circuit below on the standing issue conflicts with the decisions of other Circuits on that issue, as well as the established precedents of this Court. The Fourth Circuit in *Mobil Oil Corp. v. Attorney General of Virginia,* 940 F.2d 73, 75 (4th Cir. 1991) stated,

> "Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution."

The Tenth Circuit in *Hejira Corp. v. MacFarlane,* 660 F.2d 1356 (10th Cir. 1981) found that the plaintiffs had standing to challenge a statute prohibiting the sale of drug paraphernalia even where no criminal prosecutions had commenced and no specific arrest was threatened.

The Sixth Circuit in *Peoples Rights Organization, Inc. v. Columbus,* 152 F.3d 522 (6th Cir. 1998) found standing in a case involving a pre-enforcement challenge to an assault weapons ban in Columbus, even though there had

been nor prior prosecutions under the law. The court found standing because otherwise the plaintiffs faced this dilemma:

> "They can either possess their firearms in Columbus and risk prosecution under the City's law, or alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons."

152 F.3d at 529.

The Seventh Circuit in *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) ruled that a police officer had standing to challenge a statute prohibiting firearms possession by persons convicted of domestic violence offenses. The officer was not forced to first violate the law and subject himself to prosecution to challenge the statute.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING MEANINGFUL AND EQUAL ACCESS TO THE COURTS TO PROTECT CONSTITUTIONAL RIGHTS

This case presents important questions of law concerning whether citizens can even gain access to a court to protect their constitutional rights under at least the Second Amendment, if not under the other Amendments embodying the Bill of Rights as well. If plaintiffs cannot gain standing until they "have been singled out or uniquely targeted for prosecution" then many people will be coerced into giving up their constitutional rights to avoid the personal dangers of criminal prosecution. *MedImmune*, 127 S. Ct. at 772-773. This would be a sad and tragic loss of constitutional rights.

Moreover, this Court should act to ensure that all constitutional rights, and all rights within the Bill of Rights,

are equally enforced. But the D.C. Circuit seems to be applying a separate, stricter standard for standing in Second Amendment cases and other cases involving guns. *Seeger* and the decision below, where standing was mostly denied, involved Second Amendment challenges, and *Navegar* itself, on which these cases relied, was also a gun case.

Yet, in *Hejira*, plaintiffs were found to have standing to challenge a drug paraphernalia statute even though no one had ever been prosecuted under the statute and no specific arrests were threatened. In *United Farm Workers,* the politically correct United Farm Workers Union was found to have standing to challenge a labor regulation statute simply because the union's practices were covered by the statute and the law was expected to be generally enforced, although again apparently no one had yet been prosecuted under the statute.

In *American Booksellers*, plaintiffs were found to have standing to challenge a new criminal statute prohibiting commercial displays involving "sexually explicit nudity, sexual conduct, or sadomasochistic abuse…which is harmful to juveniles". 484 U.S. at 386. The basis for that finding was simply that "the state ha[d] not suggested that the…law will not be enforced" and there was no reason to assume it would not be, even though there had not been any prosecutions under the statute at the time. *Id.* at 393. In contrast, standing was not found in the present case even though the District has repeatedly proclaimed and demonstrated vigorous enforcement, and threatened the very plaintiffs in the case with prosecution if they violated the law.

Seegers and even *Navegar* itself noted that the standard for standing seemed to be lower for First Amendment cases than for others, particularly Second Amendment cases, even though that difference has no basis

in this Court's decisions. But as Judge Sentelle so rightly stated in his dissent in *Seegers*, "I know of no hierarchy of Bill of Rights protections that dictates different standing analysis." 396 F.3d at 1257.

As previously stated, while courts in First Amendment cases are concerned that constitutionally protected speech will be chilled by unconstitutional restrictions before they are struck down, courts in Second Amendment cases should be equally concerned that constitutionally protected ownership, possession and use of firearms will be chilled by unconstitutional restrictions before they are struck down. This important issue should be resolved by the Court in this case as well.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the requested Cross-Petition for a Writ of Certiorari, and reverse the decision of the District of Columbia Circuit below on the standing issue.

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